

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

11 **BENJAMIN GOMEZ,**

12 Plaintiff,

Case No. CV 09-869-SU

13 v.
14 **MICHAEL J. ASTRUE**, Commissioner
of Social Security,

**FINDINGS AND
RECOMMENDATION**

15 Defendant.

16 Tim Wilborn
PO Box 2768
17 Oregon City, Oregon 97045
Attorney for plaintiff

18 Dwight Holton
19 Acting United States Attorney
District of Oregon
20 Adrian L. Brown
Assistant United States Attorney
21 1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204
22 Attorneys for defendant

23 SULLIVAN, Magistrate Judge:

24 The matters before the court are a stipulated motion for award of fees pursuant to the
25 Equal Access to Justice Act, 28 U.S.C. § 2412(d), in the amount of \$6,382.37 (doc. ## 21, 22),
26 and a motion for attorney's fees pursuant to 42 U.S.C. § 406(b) (doc. # 24). The fee requested

under § 406(b) is \$20,308.65, 25% of the \$82,524.40 awarded in retroactive benefits. This is the amount agreed to in the fee agreement and the maximum amount authorized by § 406(b).

STANDARDS

The rate for a fee award under EAJA is capped by statute and tied to the Consumer Price Index. See, e.g., Ramon-Sepulveda v. INS, 863 F.2d 1458j (9th Cir. 1988).

Section 406(b) controls fees awarded for representation of Social Security claimants. Gisbrecht v. Barnhart, 535 U.S. 789, 794 (2002). Under § 406(b), the court may allow a “reasonable fee” not to exceed 25% of the retroactive benefits awarded to the claimant. *Id.* at 795. However, § 406(b) “does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants.” *Id.* at 807. Nevertheless, within the 25% maximum, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered. *Id.* at 807.

In evaluating a request for fees under § 406(b), the court must look to the fee agreement, then test its reasonableness in the particular case. Crawford v. Astrue, 586 F.3d 1142, 1149 (9th Cir. 2009) (en banc), citing Gisbrecht, 535 U.S. at 808. The factors to be weighed when considering a reduction include the character of the representation, the results the representative achieved, any delay attributable to the attorney seeking the fee, whether the benefits obtained were proportionate to the time spent on the case, and the risk assumed by counsel in accepting the case. Gisbrecht, 535 U.S. at 808; Crawford, 586 F.3d at 1149.

DISCUSSION

1. Fees under EAJA

Fees awarded under EAJA are governed by the statutory cap of \$125 per hour and the urban Consumer Price Index (“CPI-U”). See 28 U.S.C. § 2412(d)(2)(A) (hourly rate capped at \$125 per hour unless court determines that an increase in the cost of living or a special factor justifies a higher fee). To arrive at the current adjusted hourly rate, \$125 is multiplied by the urban Consumer Price Index (“CPI-U”) for the current month, available at

<http://www.bls.gov/cpi/cipd1007.pdf>, and divided by the CPI-U for the month Congress adopted the current EAJA ceiling, March 1996. The stipulated amount is consistent with this rate and the hours expended by counsel.

2. Fees under § 406(b)

The court finds no basis for reducing the requested fee based on the character of the representation, the results achieved, or delay attributable to the attorney seeking the fee.

In Harden v. Commissioner, 497 F. Supp.2d 1214, 1215 (D. Or. 2007), Judge Mosman observed that “[t]here is some consensus among the district courts that 20-40 hours is a reasonable amount of time to spend on a Social Security case that does not present particular difficulty.” (citing cases). Judge Mosman held that absent unusual circumstances or complexity, “this range provides an accurate framework for measuring whether the amount of time counsel spent is reasonable.” *Id.* at 1216. Plaintiff’s attorney has submitted a document showing that the total attorney time expended on this case was 36.55 hours, which is within the 20-40 hour range. The retroactive benefits obtained were \$82,524.40, for the period between July 2005 and December 2010.

Counsel represents to the court that in Social Security court cases, there is only a 34.24% chance of winning benefits for the claimant, so that a strict hourly rate limitation does not provide adequate compensation for Social Security claimants' lawyers. When the risk of non-payment is considered, the contingent fee agreed to by plaintiff and counsel is reasonable.

Conclusion

I recommend that the stipulated motion for a fee award under EAJA in the amount of \$6,382.37 be granted, and that plaintiff's counsel be awarded the requested sum of \$20,308.65 pursuant to § 406(b) less the amount awarded under EAJA.

Scheduling Order

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due **May 20, 2011**. If no objections are filed, then the Findings and Recommendation

1 will go under advisement on that date. If objections are filed, then a response is due **June 6,**
2 **2011.** When the response is due or filed, whichever date is earlier, the Findings and
3 Recommendation will go under advisement.

4

5 Dated this 3rd day of May, 2011.

6 /s/ Patricia Sullivan
7 Patricia Sullivan
United States Magistrate Judge